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March 26, 2002

EX PARTE

William F. Caton  
Acting Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: CC Docket No. 02-35

Dear Mr. Caton:

Cbeyond Communications submits the following information for consideration in the above-captioned proceeding.

Cbeyond Communications provides the information herein, which is in addition to Cbeyond's Comments filed on October 22, 2001 and Cbeyond's December 7, 2001 written Ex Parte filing in CC Docket No. 01-277. As stated in Cbeyond's previous filings, Cbeyond is a facilities-based service provider that serves small business customers in the local exchange market in Atlanta via DS1 unbundled local loops and DS1 UNE combinations purchased from BellSouth. As such, in order to compete with BellSouth on a level playing field it is imperative that the intervals for which BellSouth provisions Cbeyond's requested DS1 unbundled local loops and DS1 UNE combinations be at parity with the intervals BellSouth markets and provisions for its own retail customers. Despite the fact that parity demands equivalent intervals by definition, and that BellSouth is legally required to provide nondiscriminatory access as set forth in Sections 251, 252 and 271 of the Telecommunications Act of 1996, BellSouth continues to discriminate in favor of its retail customers. BellSouth's refusal to modify its intervals to establish parity, especially in light of its pending 271 application, clearly demonstrates BellSouth's market dominance and its intent to discriminate against new entrants in the local exchange market.

On March 14, 2002, BellSouth filed an Ex Parte presentation in the above-captioned docket in response to certain questions propounded by the Commission. In Question 6, inter alia, the Commission requested: (a) an explanation of what products are included in the catch-all buckets; (b) disaggregated data for the UNE category with the greatest volume; and (c) an explanation regarding the disparity between retail and wholesale performance for the order completion interval timeliness measure. This filing will explore each of these questions and provide the Commission with a clear understanding of the issues and harms to the competitive local exchange industry in Georgia.

In response to (6)(a), BellSouth listed multiple products and referenced some 60 other products that are included in the catch-all bucket. Cbeyond, as well as other CLECs, recognized the problems with this "catch-all" bucket, such as the potential for BellSouth to mask poor performance for certain UNEs,

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including those as important as EELs and Non-switched combinations (collectively referred to herein as "EELs"). Cbeyond, and other CLECs, requested during performance measure workshops in the fourth quarter of 2001 that the Georgia Commission require BellSouth to separate EELs as a separate product disaggregation and include EELs in the remedy plan. BellSouth begrudgingly agreed to report on EELs separately, if ultimately ordered to do so by the Georgia Commission, after staff agreed with the competitive industry that EELs should be reported in a disaggregated fashion. However, BellSouth strongly argued against including EELs in the remedy plan.

In response to (6)(b), BellSouth reported that 100% of the orders in the UNE Combo Other category for October and November 2001 were EELs. This, in and of itself, underscores the clear need for BellSouth to report on EELs in a disaggregated manner. In addition, it is important to note that in October and November 2001, the vast majority of the EELs were DS1 UNE combinations ordered by Cbeyond in Georgia (October - 86% and November - 80%). UNE DS1 EELs have a standard interval of 10 business days in Georgia, whereas BellSouth's equivalent DS1 retail service has intervals of 5 business days when the facility is found in BellSouth's Facility Assignment System ("FAS") and 8 business days when the facility is not in the FAS database.<sup>1</sup> Further, BellSouth commits to deliver its retail service within the 5 or 8 business day timeframe or it will provide its retail customer with a 100% credit for the non-recurring charges incurred.<sup>2</sup> CLECs have no such remedy available, and in fact do not even have the protection afforded by penalty payments for BellSouth's failure to deliver EELs in a timely manner.

Per question (6)(c), BellSouth was directed to explain the disparity between its retail performance and its wholesale performance for the Order Completion Interval measure. BellSouth attempts to explain its discriminatory treatment of wholesale performance as a designed vs. non-designed issue, where designed services have a longer interval, that "skews the results." BellSouth further deflects the Commission's question by responding that the Georgia Commission is addressing the disparate treatment of EELs in its performance measures proceeding. The Commission, however, should not rely on BellSouth's glossed over response. In fact, BellSouth's designed retail service in many cases carries a 5 business day interval. The only reason for an EEL to have "a somewhat larger interval to provision" is by design, not because it is a designed service. The simple fact remains that BellSouth is discriminating against CLECs who use EELs in favor of its own retail customers.

In order for BellSouth to demonstrate that it is providing non-discriminatory access to EELs, BellSouth must deliver EELs using the 5 and 8 business day intervals it uses for its retail operations. In addition, BellSouth must be required to disaggregate EELs in its performance measures. Finally, and of critical importance, BellSouth must be required to pay penalty payments for failure to deliver EELs at parity with its retail service. Currently BellSouth has no incentive to meet even the interim 10 business day intervals established by the Georgia Commission, because the products that fall in the UNE Combo Other category, including EELs, are not subject to self effectuating enforcement mechanism ("SEEM") payments.<sup>3</sup> Cbeyond, and other CLECs, have argued that EELs, which are not provided at parity with BellSouth's retail services, must be included in the SEEMs payments in order to provide BellSouth some level of incentive to provide non-discriminatory access. To date, however, the Georgia Commission's performance measures proceeding is on-going, and thus, an Order requiring BellSouth to deliver intervals

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<sup>1</sup> See Cbeyond Comments, p. 13.

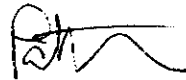
<sup>2</sup> See Cbeyond Comments, p. 16.

<sup>3</sup> Cbeyond's Georgia Commission complaint to require BellSouth to provide intervals at parity with its retail service was filed almost a year ago on April 9, 2001. While the Georgia Commission reduced the interval from 20 business days to an interim interval of 10 business days, Cbeyond and other CLECs still are unable to deliver services via DS1 UNE combinations at parity with BellSouth. See Cbeyond Comments, p. 14.

at parity with its retail operations and pay penalty payments for non-compliance is still forthcoming. Until Georgia Commission action is taken to remedy these problems, the only incentive that BellSouth has is 271 authority. For this reason, it is imperative that the Commission require BellSouth to remedy its deficiencies concerning EELs prior to any grant of Section 271 authority for Georgia.<sup>4</sup>

For all the reasons stated above, Cbeyond respectfully requests that the Commission require BellSouth to remedy the outstanding issues concerning EELs immediately or reject BellSouth's application to provide in-region interexchange service until such time as BellSouth has eliminated these competitive barriers to entry. Until the deficiencies raised by Cbeyond are remedied, BellSouth cannot demonstrate that it has met its burden of proof required by Section 271 of the Telecommunications Act of 1996.

Sincerely,



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<sup>4</sup> See Cbeyond Comments, pp. 21-22.